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ABSTRACT

Two articles in this instructional newsletter elucidate rulings by the United States Supreme Court, Circuit Court of Appeals, and District Courts affecting state sponsored school prayer: (1) "First Amendment Prayer Pendulum"; (2) "First Amendment. Rosenberger v University of Virginia." The newsletter provides the facts of the cases, legal precedents, arguments presented by both sides, significance of the decisions, as well as suggestions for appropriate teaching methods. Articles cover the First Amendment issues of school prayer and public funding for student religious magazines through student activities fees. Teaching strategies for examining both of these issues, including student handouts, are provided. (LH)

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ON THE COURTS

American Bar Association Special Committee on Youth Education for Citizenship

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TO THE EDUCATIONAL RESOURCE INFORMATION CENTER (ERIC)

First Amendment

Prayer Pendulum

Update on the Courts 3.3, 1995, pp. 1–5. © American Bar Association.

In the three years since the U.S. Supreme Court's decision in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), that school-sponsored prayer at high school graduations runs afoul of the establishment clause, litigation and legislation over prayer in public schools have exploded. The legal landscape now features a deepening split among federal circuit courts, an escalating skirmish among activist legal groups, and no small amount of confusion.

Congress, too, has gotten in on the act. Senator Jesse Helms, R-N.C., last spring attached to an education funding bill an amendment directing the government to cut off all federal money to states or school systems that prevent students from taking part in "constitutionally protected prayer in public schools by individuals on a voluntary basis." That version did not survive.

Students accuse schools of trampling on their right of religious expression, while others insist that what they see is improper and illegal government endorsement of religion. Competing ideas of what constitutes voluntary prayer complicate the discussion. But one key issue is the legal ground that remains after *Weisman:* If school-sponsored prayer at high school graduations is not constitutionally acceptable, is graduation prayer led by students permissible?

Close on the heels of *Weisman*, the Fifth U.S. Circuit Court of Appeals accepted that loophole as law in the three southern states that compose it: Louisiana, Mississippi, and Texas. In *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), it upheld a resolution that allowed high school seniors to choose a student volunteer to deliver at graduation ceremonies an invocation and a benediction that are "nonsectarian and nonproselytizing in nature."

The court reasoned that student control of prayer removes the taint of government entanglement, and that graduating high school seniors are less impressionable than younger students. The

Schools as "Government"

Americans commonly think of government, or "the state," as consisting of the federal executive, legislative, and judicial branches, plus administrative agencies. But government in the broad sense includes all federal agencies and bureaus, plus state, county, city, and township governments. Schools are institutions run by local governments and, thus, are bound by the Constitution as are governmental entities per se. The First Amendment's establishment clause calls for the separation of church and state. The meaning of this clause is in dispute with regard to school prayer.

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SPECIAL COMMITTEE ON
Youth Education for Citizenship
AMERICAN BAR ASSOCIATION

UPDATE
THE COURTS

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Supreme Court denied certiorari, causing some religious organizations to inaccurately suggest that this was the same as upholding the appeals court case on its merits. *Clear Creek* is the law in Louisiana, Mississippi, and Texas until the Supreme Court speaks on the issues.

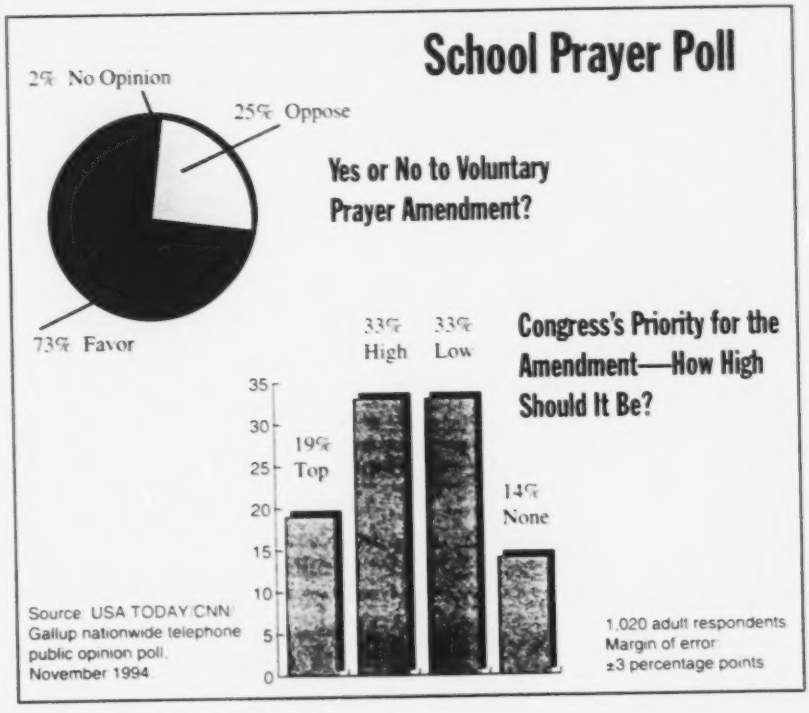
Remember—

when the Supreme Court grants a *writ of certiorari*, it agrees to review a case from a lower court.

The fallout from *Jones* has been nothing short of extraordinary. In the South, school districts have been energized by the news that voluntary, student-led graduation prayers will pass muster. A Gallup poll found 76 percent of public high schools in the South planning prayers delivered by students at their graduation ceremonies.

Throughout the United States, the phrases "student-initiated," "nonsectarian," and "nonproselytizing school prayer" have been appearing in resolutions and laws. In April 1994, for example, the District of Columbia Board of Elections and Ethics accepted a ballot initiative that would allow public schools to permit such prayers during compulsory or noncompulsory school-related student assemblies, sporting events, and graduation ceremonies.

The American Civil Liberties Union and People for the American Way launched a preelection challenge, but Superior Court Judge José Lopez refused to stop the initiative, saying, "there is no cause to believe that government involvement will be perva-



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sive." The ruling has been appealed, while proponents collect signatures to put the initiative before voters.

Some observers are alarmed by the wave of activity. "I think what is happening is remarkable and shows how much harm can be done with one bad decision," says Douglas Laycock, a University of Texas law professor and constitutional law scholar who has written extensively on religious liberty.

Laycock contends that *Jones* was wrongly decided, that the students were not acting independently but under school officials' cloak of authority. The decision, he says, seems to thumb its nose at the prohibition of *Weisman*.

Jones... seems to thumb its nose at the prohibition of _Weisman_.

In Mississippi, U.S. District Judge Henry Wingate took a tougher line in reviewing a sweeping school prayer statute that attempted to push the student-initiated logic of *Jones* even further. *Ingebretsen v. the Jackson Public School District*, 864 F. Supp. 1473 (S.D. Miss. 1994).

In a 43-page decision, Wingate struck down a law that, like the District of Columbia proposal, included language making prayer all but mandatory at events ranging from a formal graduation to "other school events." Tennessee, Georgia, Virginia, and Alabama have passed similar legislation. Although obliged to follow *Jones*, Wingate upheld only the sliver of the law that allows student-led prayer at high school graduation ceremonies.

Critics of the student-initiated trend argue that the *Jones* decision ignores the second key holding of *Weisman*. In that case, the Supreme Court, affirming the lower courts, tossed out the practice of prayer at Nathan Bishop Middle School in Providence, R.I., not only because the school picked the cleric and gave guidelines for speaking at the ceremony, but also because the very nature of graduation ceremonies involves more than a hint of compulsion.

Justice Anthony Kennedy wrote, "the undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, to maintain respectful silence during the invocation and benediction."

Justice Kennedy also attacked the idea of a high school graduation as voluntary: "Absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years."

Some lawyers and legal scholars question the difference drawn between student-led and government-sponsored prayer at official school events.

Some lawyers and legal scholars question the difference drawn between student-led and government-sponsored prayer at official events at school. If the government entity, in this case, the school or school system, delegates its authority to organize an event to students, the event retains the mark of state action, they say.

Although the Fifth Circuit's reading in *Jones* helped to catapult school prayer to prominence, it is not the law of the land. Other lower courts have rejected the student-led rationale, including the Third U.S. Circuit Court of Appeals, which in June 1993 enjoined a proposed student-initiated graduation prayer.

In late November 1994, the Ninth U.S. Circuit Court of Appeals, in a 2-to-1 decision, also rejected the reasoning in *Jones*. The court held that an Idaho public school's practice of allowing seniors to vote on a representative to deliver a graduation prayer was no more constitutional than inviting a priest to the podium. *Harris v. Joint School District* No. 241, 41 F.3d 447 (9th Cir. 1994).

While religious organizations have seized on *Jones* as ammunition in the battle for public opinion, ironically, by authorizing a certain type of prayer—student-initiated, nonsectarian, and non-proselytizing—the rule demands that someone police proposed prayers' content.

"It becomes content-based discrimination," says Kelly Shackelford of Dallas, southwest regional director for The Rutherford Institute, which litigates on behalf of religious freedom.

Students will be told they may not say "Jesus" or "God," for example. When one young Texas student, the son of a Baptist minister, was so directed, he complained he did not know how to pray without saying "Jesus" and sued the school on grounds of mental anguish, Shackelford said. *Shawhan v. McAllen Independent School District*, No. 94-60115.

Shackelford sees another dangerous trend in these cases: Judges are employing the reasoning used to allow school censorship of student newspapers in *Hazelwood School District v. U.S.*, 433 U.S.

299 (1977). The Supreme Court allowed censorship in that case on grounds that putting together the newspaper was part of the school curriculum.

In a recent Texas prayer case, for example, U.S. District Judge Ricardo Hinojosa held in an unpublished opinion that the McAllen school district could control the content of graduation prayers because such ceremonies were an extension of curriculum.

But teachers' rights may also be at stake. In another of the many recent cases, the Fifth Circuit upheld post-game prayers on the basketball court—a tradition among the high-profile Duncanville, Texas, girls' basketball team—as long as students started them and coaches, teachers, and other school officials did not lead them, take part, or give the appearance of participation.

"We need direction on teachers' rights.... Are employees supposed to run from the room if they see kids praying?"

"We need direction on teachers' rights," Shackelford says. "Are employees supposed to run from the room if they see kids praying? This is one of the biggest areas that has not been answered.

"We are concerned about teachers' rights to lead their own faith so long as they don't push their beliefs on others."

In trying to keep the line between church and state clear, can schools overstep their bounds and stifle private religious expression?

Students in Corpus Christi, Texas, who rallied around a school flagpole in September 1992 as part of an annual, national school prayer rally were dispersed and told by school officials that their meeting was illegal. A lawsuit was filed on the students' behalf in the Southern District of Texas. *Cameo Bishop v. Corpus Christi Independent School District*, No. C-93-260.

"Students acting on their own can do pretty much anything they want. Schools can't do anything."

"See You at the Pole," as the gathering is called, takes place every September, usually before the school day starts. Students in Texas began the event in 1990 with about 45,000 participants. The gathering now includes all school districts in the country, and participation in last year's rally may have capped 2 million. Principals, teachers, and other public school officials may not take part in the observance.

Another surge of activity involves legislation authorizing, and in some cases even mandating, a moment of silence in public schools. Georgia's law, for instance, requires schools to begin each day with a minute of silence.

State legislatures are mindful that in 1985 the Supreme Court struck down an Alabama statute because it was worded so as to require students to use the time for prayer. *Wallace v. Jaffree*, 472 U.S. 38.

The new crop of statutes and local resolutions are an effort to carve out safe legal ground with language that is more content-neutral and discretionary.

In September 1994, the school board in St. Tammany Parish, Louisiana, for example, unanimously approved in September a sweeping school-prayer policy. It includes a provision saying, "Teachers may announce a moment of silent reflection in their class at beginning of each day. Individual students are free during this time to reflect according to their own conscience, as long as they are silent."

According to the University of Texas's Laycock, one guideline on school prayer emerges: "Students acting on their own can do pretty much anything they want. Schools can't do anything."

Adapted from Pamela Coyle, "The Prayer Pendulum," ABA Journal *(January 1995):* 62–66. ◆

. . . News Brief . . .

Legal aliens seek security through citizenship—

Since California voters approved Proposition 187 in November, a massive surge for citizenship has spread through the nation's 10 million permanent legal aliens. Fears prompting the increase in applications include loss of Social Security benefits. Under current law, legal aliens pay taxes as citizens do, and they are entitled to most citizenship benefits except the right to vote and hold most public offices.

First Amendment

by Stephen A. Rose

1. Below are some terms that students must know in order to understand and be able to talk about the legal issues involving school prayer. Before the entire class reads the article on pages 1–4, have a group of three to five students read it and prepare a chart of the terms, with their definitions, adding other terms from the article as they feel appropriate. The group will furnish the class with the chart as a reference to use during class discussions and assignments.

Terms

benediction
cleric
compulsion
content-neutral
discrimination
discretionary
establishment clause
invocation
nondenominational
nonproselytizing
nonsectarian

2. Have students read the article on pages 1–4 as well as the background piece "Religious Freedom and Free Expression Rights" on page 11. Review the U.S. Supreme Court's ruling in *Lee v. Weisman*. Consider what is said about the school's selecting the cleric, social pressure to attend graduation, voluntary prayer at school-sponsored functions, and the constitutionality of school prayer at public school graduation ceremonies.

   Compare and contrast the ruling of the Fifth U.S. Circuit Court in *Jones v. Clear Creek Independent School District* with the U.S. Supreme Court's ruling in *Lee v. Weisman*.
3. Have students review this list of prayer activities in public schools and identify those they agree with, those they don't agree with, and those they are uncertain about.
   a. A cleric is invited by school officials to deliver a nondenominational invocation and/or benediction.
   b. Students invite a cleric to offer prayers at graduation ceremonies.
   c. Students initiate and lead nondenominational prayers at graduation.
   d. Students read biblical passages in a school-sponsored talent show.
   e. During school hours, students rally around the flagpole as part of a national school prayer rally.
   f. A school marching band's halftime show is religious in nature, and the band marches in the formation of a cross.
   g. Students are required to start each day of school with a moment of silence.
   h. Students should not be subjected to any type of prayer in school or at a school-sponsored activity.

   In groups of three, have students share and explain their selections. Then have the groups determine which items would be allowed according to *Lee v. Weisman* and *Jones v. Clear Creek*.
4. Have groups of three students write a fictional, but realistic, case study about school prayer (50–70 words). Have the groups exchange cases and act as a court to determine if prayer is allowable. Majority and dissenting opinions are welcome.
5. Read students the case below and ask how they would advise the school board to proceed.

> In response to strong community support for prayer at graduation, Crest Public School Board is considering allowing student-initiated, -written, and -led nondenominational prayer at graduation ceremonies this spring. Two seniors from the high school surveyed the senior class of 57 students, and 50 had no objections to prayer at graduation, while 7 had strong objections. These data were presented to the board in a petition to allow student-written and -led nondenominational prayer at graduation. The board's legal counsel has advised against prayer at the school's graduation ceremony.

Stephen A. Rose is a professor of education at the University of Wisconsin in Oshkosh.

First Amendment

Rosenberger v. University of Virginia

Docket No. 94-329, argued March 1, 1995

Update on the Courts 3.3, 1995, pp. 6–9. © American Bar Association.

Petitioner: Ronald W. Rosenberger *et al.*
Respondent: Rector and Visitors of the University of Virginia *et al.*

Broadened government activity in the twentieth century has meant that religious and governmental activities have increasingly overlapped. Each of the Supreme Court's modern establishment clause decisions addresses how American society should deal with this phenomenon. *Rosenberger v. University of Virginia* will help to clarify the Court's current position on that question.

The First Amendment protects free speech rights but also prohibits laws that would establish religion. This case asks the Supreme Court to decide if the free speech rights of the student publishers of a religious magazine were violated when the University of Virginia, relying on concerns about establishing religion, refused to provide funds from its student activities fees to partially pay the costs of publishing the magazine.

Does the free speech clause of the First Amendment require the University of Virginia to subsidize the publication of a religious magazine through its student activities fees? Or does the establishment clause of the First Amendment prohibit the University from doing so?

FACTS

Like many state universities, the University of Virginia requires its students to pay a student activity fee. The resulting fund, which is administered by the University's student council, is used to support many student organizations. However, the University limits the groups that may get support from the fund, even within the categories for which funding is authorized. Groups publishing *cultural* magazines may get support, but groups whose publications are *religious* may not. Similarly, political organizations and social organizations such as fraternities may not get funds, although organizations publishing political-opinion magazines may.

Ronald Rosenberger and other students at the University founded Wide Awake Productions in 1990. The group publishes *Wide Awake: A Christian Perspective at the University of Virginia*. As a student organization, Wide Awake had free access to University computer facilities and meeting rooms. But when Rosenberger applied for funding in 1991 to cover *Wide Awake* magazine's printing costs, the student council's appropriations committee denied the application because the publication was a religious activity and, therefore, not eligible for funding.

Other student organizations with some religious focus have received funding from the student activities fund. For example, the Muslim Student Association received funding that supported its publication of a magazine containing articles on Islamic doctrine, and the C. S. Lewis Society received funding to support its efforts to "promote interest in, and discussion of, various . . . topics, with a particular emphasis on the work of the 'Oxford Christians.'" According to the University, these groups were funded as groups engaged in cultural, not religious, activities.

Rosenberger, as a member of Wide Awake Productions and as editor in chief of *Wide Awake* magazine, and two other students sued the University in federal district court. They did not dispute the University's assertion that *Wide Awake* magazine was a religious activity, but argued that the school's decision to deny financial support for the publication from the student activities fund violated their constitutional rights of free speech and the free exercise of religion. In addition, they argued that the University's distinction between cultural activities, which could be funded, and religious ones, which could not, was itself unconstitutional.

Judge James Michael, Jr., ruled for the University. He concluded that the denial of funding did not violate Rosenberger's constitution-

al rights of free speech or free exercise of religion. 795 F. Supp. 175 (W.D. Va. 1992). On appeal, the Fourth Circuit affirmed. However, in its view, the denial of funding did impose a burden on the group's free speech rights; yet the burden was nonetheless constitutionally permissible because providing funding would have been an unconstitutional establishment of religion. 18 F.3d 269 (4th Cir. 1994). In other words, there was a "compelling interest" for the University, as an agency of the government, to withhold funding. It is this decision that the Supreme Court reviews, having granted the students' petition for a writ of certiorari. 115 S. Ct. 417 (1994).

The Supreme Court has held that the establishment clause is not violated when religious organizations receive support through certain general programs. In *Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993), the Court held that the establishment clause was not violated when the state provided a sign-language translator for a deaf student attending a religiously affiliated school, even though the translator—paid by the state—would make religious statements in some translations. And in *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court upheld the constitutionality of grants to religious organizations through the Adolescent Family Life Act to support their programs to combat teenage pregnancy. Some of these programs had religious content.

The generally accepted understanding of these cases is that the establishment clause is not violated because the programs have a wide scope, and religious activities are only a small portion of the overall government program. These facts mean that, although government is in some sense supporting religious activities, it is not endorsing or demonstrating affirmative approval of religion as such.

These decisions, however, have suggested that there are circumstances under which supporting religious organizations even through general programs would be an establishment clause violation. Thus, in *Bowen*, the Court suggested that there would be a constitutional problem if the program receiving support was as pervasively religious as *Wide Awake* appears to be.

SIGNIFICANCE

The *Rosenberger* case presents an intriguing problem. Under the Court's free speech precedents, at least sometimes the government *must* include religious organizations among the organizations to which it makes facilities available. In one sense, therefore, government must subsidize religious organizations by making physical space available to them instead of requiring them to rent space in the private market. Yet, under the Court's establishment clause precedents, there are times when government may *not* provide direct financial assistance to religious organizations.

Why should one form of subsidy be required and the other prohibited? The primary distinction is between a subsidy that merely makes government's physical facilities generally available to a wide variety of organizations and a subsidy that makes government funds available.

Many critics have questioned this distinction. The Court's resolution of this case may indicate the direction it is inclined to follow in resolving this conflict.

Adapted from Mark V. Tushnet, "Free Speech and the Religion Clauses: Can a State University Refuse to Use Student Fees to Support a Religious Magazine?" Preview of United States Supreme Court, *no. 5 (10 February 1995): 229–33.*

"Compelling Interest"

Sometimes, a "compelling interest" on the part of government justifies its discrimination on the basis of viewpoint. In *Rosenberger*, the Fourth Circuit found that funding *Wide Awake* would have violated the First Amendment's establishment clause. The compelling interest the government had in preventing such a constitutional violation justified the University's action, in the Fourth Circuit's opinion. The Supreme Court will issue its ruling on this and other issues in *Rosenberger* this spring.

Lines of Precedent

Which line of precedent will the Supreme Court follow in deciding *Rosenberger v. University of Virginia?*

GOVERNMENT'S OWN SPEECH

Within quite broad limits:

- Government may choose messages it wishes to send.
- Government may discriminate against particular subject matter and viewpoints.
- Standard of "reasonableness" applies.

TEST A: In *Rosenberger,* is the University's discrimination against *Wide Awake* reasonable in the sense that the school is distributing its limited resources in the most socially valuable way in keeping with its educational mission?

PRIVATE SPEECH

Government's choices relate to the type of forum involved:

- For nonpublic forums, the government may discriminate based on subject matter and viewpoint.
- For public forums, the government may not discriminate based on subject matter and viewpoint, but it may restrict the time, place, and manner of private speech.
- For limited-purpose public forums, the government may confine private speech to specific subjects, but it may not discriminate among different viewpoints within a subject area. For example, it may allow all plays but no political rallies. But it may not eliminate *certain* kinds of plays or allow *certain* kinds of political rallies.

TEST B: In *Rosenberger,* are cultural and religious topics different sorts of topics? Or are religion and culture within the same topic? Is there a "compelling interest" that justifies the University's discrimination?

Introduction

When government refuses to provide money to people who want to exercise their right of free speech, the Supreme Court has produced two lines of precedent that are in some tension. (See page 1 for the special definition of *government* in this discussion of establishment clause issues.) One line involves cases in which the Court treats the expenditure of funds as a way in which government itself speaks. The other line involves cases in which the Court treats such expenditures as a way in which government facilitates the speech of private parties. Different constitutional tests apply depending on which characterization of the case the Court selects.

I. Government's Own Speech

Government may speak through its own employees, or it may speak through others it hires or subsidizes. If government itself is speaking, the Court has said that government may choose the message it wishes to send and does not need to send competing or alternative messages, at least within quite broad limits. For example, government may develop a program to "Just Say No to Drugs" without violating the constitutional rights of those who would like to say "Just Say Yes." Similarly, government may subsidize family-planning organizations whose message is that abortion is not an appropriate method of family planning without subsidizing organizations that believe abortion is an appropriate method. *Rust v. Sullivan,* 500 U.S. 173 (1991).

In spending money, therefore, government may support or discriminate against particular viewpoints. There are some limits on viewpoint discrimination, however. For example, no First Amendment scholar believes that government could explicitly provide funds to only the Democratic (or Republican) party.

Generally, courts apply a "standard of reasonableness" in assessing the constitutionality of speech facilitated by governmental funding choices. For example, if a state university decides that teaching mathematics is more important

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than teaching sociology, it may shut its department of sociology without violating the free speech rights of sociologists. Similarly, a university may have a department of philosophy but not a department of religion or theology, or an institute for Islamic studies without having an institute for Christian studies.

In *Rosenberger*, the University's position is that its choice to prefer cultural activities over political, social, and religious ones is a reasonable decision about the most socially valuable way to distribute its limited resources consonant with its educational mission, even though its decision may in some ways discriminate against religious points of view.

If the issue is treated as one of government speech, the primary question is whether or not the distinction between cultural and religious activities is reasonable. However, the difficulty of distinguishing between *Wide Awake*'s religious character and the purportedly cultural character of the C. S. Lewis Society suggests that the University's attempt to distinguish between cultural and religious activities may not be reasonable.

II. Private Speech

If the issue is treated as one of government facilitation of private speech, the Court asks whether the forum involved is a nonpublic forum, public forum, or limited-purpose public forum.

Note that, in law, many things can constitute a forum, including a place, such as a street, a park, or even mailboxes (see the following). Whether a fund, such as the student fund in question in *Rosenberger*, constitutes a forum is one of the issues the Court may decide in this case.

Nonpublic forum If the student activities fund is a nonpublic forum, again government may discriminate on the basis of viewpoint. Mailboxes are an example of one sort of "nonpublic forum" to which access may be cut off in various circumstances. In *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), for example, a government employer—a public school—did not have to allow public access to its employees' mailboxes. The Court held that the school system had not converted its internal mail system to a public or limited-purpose public forum. Thus, it could limit access based on subject matter or viewpoint.

Public forum The classic public forums are streets and parks. In such places, government may not discriminate against applicants for, say, parade permits, either on the basis of the viewpoint they wish to get across or on the basis of the subject they wish to address. Instead, government is limited to establishing reasonable time, place, and manner restrictions for the use of these forums and otherwise has to make them available almost on a "first come, first served" basis.

Limited-purpose public forum Because all the parties agree that the University does not have to distribute the student activity fund moneys to anyone who asks, the primary dispute in *Rosenberger* is whether or not the fund should be treated as a limited-purpose public forum. In that context, government is allowed to confine its limited-purpose public forums to specific subjects, but it may not discriminate among different viewpoints on those subjects.

A good example of a limited-purpose public forum is a municipal auditorium that government makes available for presenting plays but not political rallies. If a presentation deals with an acceptable subject, the government may not exclude it on the basis of the viewpoint it offers. That is, the municipal auditorium may be open for plays and closed for political rallies, but it may not be opened to plays that support the government and closed to ones that criticize it.

Defining a limited-purpose public forum is, however, quite difficult. At the extreme, government can open up a forum to so many different subjects that the forum ought to be treated as a true public forum. Thus, in *Lamb's Chapel v. Center Moriches School District*, 113 S. Ct. 2141 (1993), a school board had made school auditoriums available in the evening to so many groups that denying access to a religious group was deemed unconstitutional.

A second difficulty with the Court's treatment of limited-purpose public forums is in determining whether the restriction in question involves a subject or a viewpoint. That is, is the restriction in dispute a permissible subject-matter restriction, or is it an impermissible viewpoint restriction?

In *Rosenberger*, the University views culture and religion as being different subjects. Rosenberger sees them as being two aspects of the same subject falling under the same subject area—and therefore that, if a Muslim and an "Oxford Christian" publication may be student funded, so may the Christian publication *Wide Awake*. ◆

TEACHING STRATEGY: How Would You Decide *Rosenberger?*

Update on the Courts 3.3, 1995, pp. 10–14. © American Bar Association.

by Julius Menacker

The U.S. Appellate Court case *Rosenberger v. University of Virginia* is a recent example of the contrasting and interplaying tensions raised by the need to balance free exercise of religion versus the prohibition against government establishment of religion and the right to free speech versus the limits of that right.

OBJECTIVES

- Understand the meaning and importance of the civil rights contained in the First Amendment
- Appreciate the unique attributes of both First Amendment freedom of religion and First Amendment free expression rights
- Understand that various civil rights may collide or have varying applications in different contexts
- Appreciate that public institutions, such as public schools or state universities, are agencies of government, and so are required to allow free exercise of religion and free expression, while also enforcing the constitutional constraints on keeping public institutions neutral regarding religion
- Analyze the relative importance and complexity of applying the free exercise and establishment clauses, along with free expression, to the issues in *Rosenberger*

Target Group: Grades 11–12
Time Needed: Two weeks
Materials Needed: For each student, pages 6–9, 11–14 of this booklet

PROCEDURES

1. Have students read and discuss "Prayer Pendulum" on pages 1–4 of this booklet before using this strategy. If desirable, assign one or more of the activities on page 5.
2. Assign Student Handout #1 for the class to read (if not already assigned in connection with the activities on page 5). Lead the class through an explanation of the elements and applications of the First Amendment. Then conduct a discussion of the various situations in which the establishment clause has benefited American society (e.g., people of different religions do not have to pay taxes to support one "official" religion, and they are not required by law to attend religious services at one "official" church).

   Repeat for the free exercise clause (e.g., students do not have to participate in required activities that violate their religious beliefs) and the free expression clause (e.g., people may speak their minds about societal issues that concern them, even if their views are not currently popular, provided their speech does not result in serious disruption or harm to others).
3. Distribute Student Handout #2 and discuss Section A with the class. Advise students to use this handout for reference while reading the case analysis found on pages 6–9.
4. Assign the case analysis on pages 6–9, "*Rosenberger v. University of Virginia.*"
5. Allow students to volunteer for the following moot court roles, in which an appeal to the *Rosenberger* decision is taken to the U.S. Supreme Court. Nine members will assume the roles of the Supreme Court justices. The remaining students should be equally divided into two legal teams, one making the appeal, and the other defending against it.
6. Have students read Section B as an aid for preparing their arguments. This can be a homework assignment in which team members write their various views for use in later classroom team meetings to prepare written and oral arguments. The "justices" will have the handout for reference purposes during oral argument.
7. Have each team submit a written brief to the Court and select a member to present the oral argument. Give each side one class period to present its argument, with the justices free to raise questions to the presenter. Justices should also take notes during the presentations.
8. After oral arguments are concluded, have the justices meet together outside class to prepare their written decision as a homework assignment. For this activity, they should use their presentation notes as well as Handouts 1 and 2. The decision should be delivered to both sides, along with an oral presentation summarizing the decision, delivered by a student elected by his/her peers as chief justice.

STUDENT HANDOUT #1 —

Religious Freedom and Free Expression Rights

The first ten amendments to the U.S. Constitution, known as the Bill of Rights, contain the fundamental guarantees safeguarding people living in the United States from abuses by government officials. Many of the founders, concerned that a strong government might someday decide to oppress the people, approved the Constitution only when it was agreed that this Bill of Rights would soon be added to it.

Once the Bill of Rights became part of the Constitution, the remaining problem was to determine exactly what each right guaranteed to the people was. The founders did not provide elaborate detail about these rights. For example, the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . ." That is all we are told about individual protections of religious freedom and free expression. Therefore, it has been left to the courts, particularly the U.S. Supreme Court, to define the meanings behind the religion and free expression guarantees. This process continues to the present day.

In defining religious freedom and free expression rights, the courts have determined that not only Congress, but all elements of the national, state, and local governments (including public schools and colleges) may neither violate religious freedom nor violate free expression, nor support any or all religions. The courts have also made clear that no civil liberties are unlimited. The exercise of personal freedom must be balanced by concern for the public welfare. For example, Justice Oliver W. Holmes, Jr., gave the example that "free speech would not protect a man in falsely shouting fire in a theater and causing a panic" (*Schenck v. United States*, 249 U.S. 47 [1919]). Nine years later, Justice Brandeis elaborated on this by explaining that "fear of serious injury cannot alone justify suppression of free speech. . . . Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears" (*Whitney v. California*, 274 U.S. 357 [1927]).

The same concerns for balancing individual freedom with public welfare have attended the development of constitutional law related to the two religion clauses. For example, the Supreme Court has accepted Thomas Jefferson's view that there should be "a wall of separation between church and state" (see page 14 for source of quotation). In support of this concept, one Supreme Court decision stated that "a union of government and religion tends to destroy government and to degrade religion" (*Engle v. Vitale*, 370 U.S. 421 [1962]). Yet, other Supreme Court decisions have held that "we are a religious people whose institutions presuppose a Supreme Being" (*Zorach v. Clauson*, 343 U.S. 306 [1952]) and that "the First Amendment . . . does not require the state to be [religion's] adversary" (*Everson v. Board of Education*, 330 U.S. 1 [1947]).

Public schools and colleges have frequently been the battlefields for sorting out the meaning of both religious and free expression rights. In the process, it became clear that these rights could collide, as when concern about not "establishing" religion encroaches upon the free exercise of religion or free expression. This has been a healthy tension in American jurisprudence, as it keeps citizens aware of the continuing need for keeping a proper balance between individual rights and the general welfare as conditions of life and interests of people change in our nation.

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STUDENT HANDOUT #2

General Principles and Relevant Cases Related to *Rosenberger v. University of Virginia*

SECTION A— GENERAL PRINCIPLES

1. Government, including public universities, may not support religious activities. However, it may support programs with a wide scope that includes some religious matter.

2. Government, including public universities, may not engage in content (subject matter) or viewpoint discrimination when a public forum has been created; that is, a forum open to expression of all viewpoints. However, if a limited-purpose public forum is established—that is, one established for a specific, identified purpose, such as discussion of and/or presentations of performing arts like music and dance—viewpoint discrimination is allowed.

3. Government agencies may not discriminate with respect to giving students access to its facilities in the absence of a compelling interest. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Supreme Court rejected the argument that adhering to the establishment clause was a compelling interest because allowing access in that case did not advance religion (see *Lemon* test, below). Compelling interest may exist under certain circumstances, however; the Court is deciding whether a compelling reason exists in *Rosenberger*.

4. In *Rosenberger*, the Court will also decide whether universities may distinguish among various types of organizations in decisions to provide financial support; for example, between cultural and religious organizations. Any such distinctions would have to be reasonable. One example of a reasonable distinction is supporting only organizations that contribute to the mission and objectives of the University. The analysis then would focus upon whether University policy appears to do that in a logical, consistent way.

5. The U.S. Supreme Court established a three-part (Lemon) test in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), for determining whether or not the establishment clause has been violated. In order to not violate the establishment clause, the action must
   a. Have a primary purpose that is secular (non-religious)
   b. Be neutral toward religion, neither advancing nor inhibiting it
   c. Avoid excessive church-state entanglement

SECTION B— CASE ABSTRACTS

Free Expression

***Sweezy v. New Hampshire*, 354 U.S. 234 (1957)** In this case, the Supreme Court held that the refusal of a professor to reveal the contents of his lecture and his knowledge of a particular political party (the Communist party) and its adherents, which resulted in the professor's contempt conviction, was an invasion of the professor's free expression liberties (academic freedom and political expression). However, in so holding, the Court also said: "A university legitimately may regard some subjects as more relevant to its academic mission than others. . . . A university has four essential freedoms consisting of the right to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

***Healy v. James*, 408 U.S. 169 (1972)** The Court upheld the right of a public university to deny a

student activity charter based on the group's association with Students for a Democratic Society, which was considered to be dangerous and disruptive by the university. In doing so, the Court recognized a "university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." The decision also noted that "every university must make academic judgments as how to best allocate scarce resources."

***Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983)** In this case, the Court had to decide if a school had created an open or limited-purpose public forum by allowing certain groups to use its teacher mailboxes, thereby requiring it to allow a losing teachers' union to put materials into the mailboxes on the same basis as the winning union. The Court decided that the mail system was a nonpublic forum and both subject matter and viewpoint distinctions could be made. If a public institution, as a school or university, has established a limited-purpose public forum or a nonpublic forum, it may discriminate with regard to viewpoint.

***Rust v. Sullivan*, 500 U.S. 173 (1991)** The Court held that government, within broad limits, may choose the message it wishes to convey (e.g., "Say No to Drugs") or support organizations with a particular controversial viewpoint (e.g., pro-abortion or anti-abortion) without allowing for competing or alternative messages.

Religious Freedom

***Bowen v. Kendrick*, 487 U.S. 589 (1988)** The Court upheld the constitutionality of public grants of money to support the work of religious organizations that support programs combating teenage pregnancy, even though the programs contained religious content.

***Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993)** In this case, the Court considered whether special education services, required under the federal Individuals with Disabilities Education Act, could be provided in a religious school. The Court held that the establishment clause was not violated when the state provided a sign-language translator for a deaf student attending a religious school, even though the state-paid translator would make religious statements in some translations.

Religious Freedom and Free Expression

***Widmar v. Vincent*, 454 U.S. 263 (1981)** The University of Missouri denied campus recognition to a student religious organization, based on its view that doing so would violate the establishment clause. The Court held that a public university could not exclude a student religious organization from the rights and benefits of being a recognized student organization when a public forum for student organizations had been created. The Court held that the establishment clause did not bar religious interests within a policy of equal access when facilities are open to groups and speakers of all kinds. This was especially applicable to a university since university students "are able to appreciate that the University's policy is one of neutrality toward religion." The Court did note that its ruling applied to student-initiated interest groups that were not sponsored by a public university, and that "our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations."

***Lamb's Chapel v. Center Moriches School District*, 113 S. Ct. 2141 (1993)** A public school board had a policy allowing community organizations to use school auditoriums for evening public meetings. When a religious group applied for permission, the board denied its use of an auditorium. The Court held that board policy had created a public forum. Therefore, it could not deny access to a group on the basis of subject-matter (including religion) or viewpoint.

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